IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.1206 OF 2003 .

Naresh K. Rajwani : Appellant.

versus

1.Rufina M. Pinto & Anr. : Respondents.

Mr.Shailesh Shah i/by G.H.Shukla for the appellant.

Mr.P.S.Dani i/by Bilawala & Co. for Respondent No.1.

CORAM : D.G.DESHPANDE,J.

DATED : 8th February 2005.

JUDGMENT

1. Heard advocates for the appellant and respondent No.1. Appellant is the original defendant No.1. Respondent No.1 is the original plaintiff. Respondent No.2 is the original defendant No.2. A suit vide Suit No.5765 of 1997 was filed by the plaintiff against the appellant and respondent No.2 claiming therein that the General Power of Attorney dated 22-7-1994 in the

name of the plaintiff appointing Defendant No.2 and a letter dated 12-8-1994 purporting to create tenancy in respect of the suit premises are fake, false and fraudulent documents and the defendants be restrained from acting upon those documents Exhibits C and D, and Defendant No.1 be declared as trespasser and ordered to hand over vacant and peaceful possession of the suit premises. Certain other reliefs were also claimed in addition.

2. The case of the plaintiff was that she was the owner of Flat No.6 on the Second floor of the building calling as SUNBEAM. She was in fact the owner of the entire building. So far as flat No.6 was concerned, Smt.Oliva Fernandes was the tenant. Oliva Fernandes was living in the suit premises with Sohnu Vaz. Oliva died on 30.3.1989. Sohnu Vaz died on 27.4.1991. But the plaintiff had filed a suit against Oliva before the Small Causes Court for ejectment vide R.A.E.Suit No.838/2622 of 1985. After Oliva's death two of her daughters who were settled in Australia were joined. There was an order of injunction against both the daughters restraining them from parting with possession of the suit

premises. Therefore, the premises were locked after the death of Oliva and Sohnu. The plaintiff ultimately got a decree from the Small Causes Court in her Suit No.838/2622 of 1985 referred to above. However, it is the case of the plaintiff that both the defendants hatched conspiracy and brought into existence two documents i.e. the power of attorney and the letter referred to above which were totally bogus and fraudulent. Those documents were never signed by the plaintiff and, therefore, she filed the suit for declaration and possession etc. According to the plaintiff, further defendant No.1 instituted a suit in the City Civil Court being S.C.Suit No.4712 of 1997 in plaintiff's name on the said power of attorney. In the Notice of Motion, commissioner came to be appointed and, when the commissioner went to the plaintiff at her residence, she came to know about this fraudulent dealing of the defendants and conspiracy and, in that background of the matter she filed the suit.

3. The appellant, who is most contested party in the matter and who has alone preferred this appeal, strongly resisted the claim of the

plaintiff. According to him, in 1994 he was in need of a premises and one estate broker Surekh Sukhani introduced him to the plaintiff. The plaintiff did not directly deal with him but did so through defendant No.2. The defendant No.2 did not file any written statement. Then Issue came to be framed by the trial Court and a decree came to be passed as stated above on the basis of conclusions arrived at by the trial Court on issues Nos. 1, 2, 3 and 11. All those findings on Issues and decree have been challenged in the present appeal.

4. Counsel for the appellant made two submissions mainly. According to him, the plaintiff has filed declaratory suit in respect of two documents and had contended that those documents were false, fake, forged, fabricated, bogus and in pursuance of a conspiracy and, therefore, initial burden of proving all those circumstances was on the plaintiff, but the plaintiff did not enter the witness box and, therefore, this was a case which should have been dismissed by the Court for failure of the plaintiff to enter the witness box, because, according to the counsel for the appellant, the

entire burden lies upon the plaintiff. He also contended that unless those documents are set aside, the plaintiff was not entitled to any relief.

. Second submission was that the valuation of the claim by the plaintiff was totally wrong. Because if, according to the plaintiff, the defendant No.1 was the trespasser, then the valuation of the suit should have been made on the basis of the value of the property which, according to the appellant, was more than Rs.30/- lacs and, therefore, the City Civil Court has no jurisdiction to entertain and decide the suit.

. The counsel for the appellant relied upon the judgment of the Supreme Court reported in **AIR 1967 SC 1395 [Kuppuswami Chettiar v. A.S.P.A. Arumugam Chettiar and Anr.]**, then another judgment of the Patna High Court reported in **AIR 2001 Patna 1 [Krishna Prasad v. Gopal Prasad and ors.]** and, another judgment of Punjab High Court reported in **AIR 1961 Punjab 253 [Lakshmi Insurance co. Ltd. v. Bibi Padma Wati]** in support of his contention regarding burden of proof. He also relied upon Sections 85 and 102

of the Evidence Act. So far as valuation is concerned, the counsel for the appellant relied upon the judgment of this Court reported in **AIR 1988 Bombay 264 [Prem Ratan Vohra v. Lalitkumar Dayalji Kakhani]**.

5. Counsel for the respondent/plaintiff, on the other hand, contended that both the aforesaid contentions raised by the appellant were properly dealt with by the trial Court and were rejected. Firstly he contended that there was no denial by the appellant/defendant No.1 about earlier proceedings initiated by the plaintiff against Oliva Fernandes before the Small Causes Court and the orders in the notice of motion against the daughters of Oliva Fernandes not to create third party rights, the passing of decree in this suit and subsequent institution of suit. The counsel for the respondent/plaintiff therefore contended that when it is proved that the plaintiff was the owner of the suit property; when she had filed the suit against Oliva and obtained a decree and when her specific case was that there was no tenancy agreement between her and defendant No.1/appellant, then burden was upon the appellant/defendant to prove that he was the

tenancy of the plaintiff. Because tenancy right could only be either acquired by inheritance or by agreement and, therefore, the burden was on the defendant/appellant. Further regarding creating two bogus documents out of conspiracy, the counsel for the respondent/plaintiff contended that the circumstances brought on record and the admissions given by the appellant/defendant were sufficient to treat these documents as bogus, fake, fabricated and forged and, non-examination of the plaintiff could not at all affect the merits of the case.

6. So far as valuation of the property is concerned, the counsel for the respondent/plaintiff contended that the suit claim was properly valued and the findings of the trial Court were not liable to be disturbed on that count. In view of these rival submissions, it has to be seen, whether the contentions raised by the appellant/defendant No.1 can be accepted and the impugned judgment can be disturbed or set aside.

7. Chapter VII of the Evidence Act deals with the burden of proof. Sections 102 and 114

are in that regard in this chapter. Counsel for the appellant/defendant relied upon Section 102 which lays down that, "The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side." The very wording of this section shows that the plaintiff would have failed in his suit if the defendant did not enter the witness box. But when the defendant entered the witness box and gave his evidence, both oral as well as documentary, then Section 102 would not come into picture. The question of burden of proof in this case is an academic. But it is raised after full trial. That whatever evidence were before the Court, it cannot be, therefore, said that the Court decided the Issues in favour of the plaintiff without there being any evidence on record. The evidence was there and, therefore, the contentions raised by the appellant/defendant No.1 on the basis of this Section and other section of the Evidence Act cannot be accepted.

8. So far as authorities relied upon by the appellant/defendant are concerned, the first judgment is of the Supreme Court reported in **AIR 1967 SC 1395 [Kuppuswami Chettiar v. A.S.P.A.**

Arumugam Chettiar and Anr.]. In that case the question was whether a release deed was vitiated by misrepresentation and, if not, whether it operated as a conveyance of the suit properties in favour of the respondents. A suit was instituted by the appellant for setting aside Exhibit B-1, recovery of suit property and accounts. He alleged that Exhibit B-1 was vitiated by misrepresentation, fraud, deceit and undue influence. His main contention was that he was induced to execute the deed on the representation that it was a power of attorney. the trial Court held that though the release deed was not vitiated by fraud, deceit or undue influence, it was procured by misrepresentation. The suit of the plaintiff was decreed. The High Court set aside the findings of the trial Court and dismissed the suit and, the matter went before the Supreme Court. The Supreme Court found that the plea that the deed was induced by misrepresentation was an afterthought and, in that background, the Supreme Court held that the onus was upon the appellant to establish the plea of misrepresentation and he has failed to establish his plea.

. From this judgment of the Supreme Court it will be clear that it was the case of misrepresentation and admittedly in case of misrepresentation, there is a presumption of participation of the person to whom the facts are misrepresented. So the burden lies upon him and if he does not enter into witness box, his whole case is liable to be rejected. In the instant case, it is not the case of misrepresentation at all. The plaintiff has totally and completely denied execution of the power of attorney and letter and, the other circumstances brought on record will corroborate and substantiate her case, even though she did not enter the witness box.

9. The second judgment relied upon by the appellant is of Patna High Court reported in **AIR 2001 Patna 1 [Krishna Prasad v. Gopal Prasad and ors.]**. In that case, there was a plea of misrepresentation. Therefore the Patna High Court held that burden was upon the plaintiff to prove the fraud. This judgment also does not apply to the facts of the present case. The plaintiff sought relief in respect of two documents on the basis that they were the

creation of conspiracy. She was never a party to those documents. She had never signed or authorised the defendants in that regard.

10. The third judgment if of Punjab High Court reported in **AIR 1961 Punjab 253 [Lakshmi Insurance co. Ltd. v. Bibi Padma Wati]**. The question in that case was about liability of Insurance Company and the court held that the onus probandi in all such cases rests heavily on the party alleging fraud. This judgment is also not applicable to the facts and circumstances of the present case. Those circumstances are that the defendant could not produce firstly the original power of attorney. When the case of the defendant was only based on the original power of attorney and, when the defendant had filed suit on that basis, it was necessary for him to produce the power of attorney. Firstly he was required to rely upon it or based his defence on the power of attorney and, secondly, as required by the Code of Civil Procedure, he was required to file copy thereof along with his pleadings and, thirdly, he was required to produce the same at the time of evidence. But at no stage the defendant could produce the power of attorney.

The trial Court has considered this aspect in para 19 of the Judgment. Before the trial Court the defendant No.1/appellant firstly stated that the power of attorney was with Defendant No.2, then on the next date of evidence he began by producing the original power of attorney. But in fact it was a Xerox copy. So this is a case where the appellant/defendant No.1 alleges existence of a lawful executed power of attorney. He files the suit on that basis but he is unable to prove it in the court. Admittedly, defendant No.2 did not file his written statement and, there is nothing to show that any summons was issued to defendant No.2 to produce the said document. Second most important circumstance, that destroys the case of the defendant No.1/appellant and has been rightly rejected, is that according to the defendant No.1, the plaintiff was very much present when the power of attorney was executed between himself and defendant No.2 as constituted attorney of the plaintiff. Simple question is, if the plaintiff was present, then why the plaintiff did not sign the document. There is no satisfactory explanation and, therefore, that case of the defendant was rightly rejected by the trial

Court. Same is the thing about the second letter about which the plaintiff sought declaration.

11. If the defendant No.1 had produced the original power of attorney and was in position to give any explanation as to why the plaintiff did not execute the said power of attorney, then case was different. But positive right on the basis of power of attorney was asserted by the defendant/appellant; he has acted upon those documents by filing suit; when the commissioner was appointed and when in that background of the matter the plaintiff was required to file this suit and when the parties had led evidence, now the case of the plaintiff cannot be rejected on the ground that she did not enter the witness box.

12. The most important thing is that the injunction was obtained by the plaintiff against two daughters of Oliva Fernandes. The trial Court rightly held that in view of the suit of the plaintiff being R.A.E. Suit No.838/2622 of 1985 pending on the date of the power of attorney and the letter, the plaintiff could not have legally created tenancy right is the strong

circumstance that nullifies the contention of the appellant. Therefore, the submissions made by the counsel for the appellant that the plaintiff has failed to discharge the burden are required to be rejected. Section 102 of the Evidence Act does not apply.

13. The counsel for the appellant also relied upon Section 85 of the Evidence Act which provides that "The Court shall presume that every document purporting to be a power of attorney, and to have been executed before, and authenticated by....." Counsel for the respondent contended that this presumption would not apply to the Xerox copy of the power of attorney. If the original power of attorney was produced, then presumption could have been raised against the plaintiff, but not when the Xerox copy is produced. This legal position has to be accepted.

14. The next contention of the counsel for the appellant was that the plaintiff had not valued the claim properly and the valuation put forth by her is wrong, because this was a suit for possession, therefore, the valuation should

have been as per the market value of the property. It was at that time more than Rs.3/- lacs and, therefore, the suit was beyond the jurisdiction of the City Civil Court. The counsel for the appellant relied upon the Full Bench judgment of this Court reported in **AIR 1988 Bombay 264 [Prem Ratan Vohra v. Lalitkumar Dayalji Kakhani]**. In para 55 of the plaint, the plaintiff has valued the claim as under :-

. The rental of the suit premises is Rs.135/- per month with taxes are paid to B.M.C. and calculating value for the purpose of Court fees and jurisdiction at Rs.440 for 150 times and, after deductions of outgoings, the plaintiff valued the prayer clause at Rs.19,440/-. The trial Court, while dealing with this Issue, found that in Para 39 of the written statement the defendant/appellant stated that the valuation of the suit shall be in excess of Rupees Fifty Thousand and, there is no further plea nor any particulars in that regard. The trial Court relied upon the Full Bench judgment of this Court referred to above. The trial Court also held that since quite early days the premises was placed custodia legis and defendant No.1 was not

in defacto possession of the suit premises. Therefore, that objection regarding valuation is rejected.

15. In the aforesaid judgment of the Full Bench of this Court, the Court has held that the basis for calculating market value of the property should be the compensation charged and not the rent of the premises. It is the net income which accrues to the licensor which should be taken as its unit value and its market value should be arrived at by multiplying it by 12 and 1/2 years, purchase or by one hundred and fifty months value and, therefore, the valuation is proper.

16. To sum up the entire defence and claim and contentions of the appellant/defendant No.1 was rightly rejected by the trial Court. Hence no interference is required for. Therefore the order :-

:ORDER:

The appeal is dismissed with costs.

Receiver to stand discharged.

Prayer for stay is rejected.

[D.G.DESHPANDE]

08/02/2005 JUDGE.